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Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant John Wiley & Sons, Inc. (“Wiley”) respectfully submits this Memorandum of Law in support of its Motion for Partial Summary Judgment to dismiss claims made by plaintiff Laura Dwight (“Dwight”).

INTRODUCTION

Over a period of more than twenty years Wiley and Dwight had a mutually beneficial relationship, with Wiley making licensed use of Dwight’s stock photos in its publications and Dwight receiving payments, both directly and through her agents, in return. Dwight is no longer primarily occupied as a photographer and “do[es] very little licensing now.” Curley Decl., Ex. B at 113:7-11 (Transcript of Deposition of L. Dwight). Instead, she is “working on a presently unpaid basis for [her co-plaintiff] Ellen Senisi’s start up company,” a “provider of online curriculum.” *Id.* at 11:22-12:11. She still receives some money from licensing her stock photos—in the “last five years, [her] net for [her] direct licensing of [her] photography was somewhere in the neighborhood of 20 to \$30,000” plus “about \$2,500” from licensing through agents. *Id.* at 16:14-17:2 & 19:15-19.

Dwight began to read “industry news” about “publishers engaged in [a] practice of underrepresenting how many books they were going to print.” *Id.* at 49:6-50:11. She learned that “[t]here [were] court cases about it. There were people that [she] knew that had pursued copyright infringement.” *Id.* at 50:4-11. She discussed these copyright cases with Senisi and others, *id.* at 51, and Senisi put her in touch with her attorneys. *Id.* at 37:14-38:5. Dwight then got in on the action herself. She pursued claims against another textbook publisher, and obtained a settlement through which she received *more than twenty five times* her typical yearly licensing income. *Id.* at 32:1-22.

Hoping to catch lightning in a bottle again, Dwight brought this case against Wiley. But, she had no basis for doing so. Rather, she had only a generalized belief that printing more copies than had been licensed “had become something that publishers did.” *Id.* at 49:6-17. She conceded that she “cannot substantiate her feeling that these violations have occurred,” *id.* at 45:1-2, and she had no

“information that showed that Wiley had exceeded any license.” *Id.* at 48:5-10. Rather, she brought suit because “Wiley would not release information about how [her] photos were used.” *Id.* at 44:3-8.

Accordingly, when Dwight initially began this case on May 16, 2013, along with six other plaintiffs, at that time she sought only a declaration that she had a right to audit Wiley’s use of her photos. *See* Curley Decl., Ex. KKK. An amended complaint filed July 15, 2013 added a claim for copyright infringement. *Id.*, Ex. LLL. On March 28, 2014, Judge Swain, to whom that action is assigned, dismissed all plaintiffs’ claim seeking an audit of Wiley, directed one of the plaintiffs to amend the complaint to assert her individual copyright infringement claims, and dismissed the remaining plaintiffs, left to assert their surviving claims in new separate actions. *See id.*, Ex. MMM at 17.

Five months after her claim that she was entitled to an audit was rejected by the Court, Dwight filed this action alleging copyright infringement in connection with her licensing transactions with Wiley, based on her “belie[f] that more copies were copied of books than I licensed.” *Id.*, Ex. B at 49:6-9. She pursued these claims even though she “not aware of any instance in which Wiley violated one of [her] licenses.” *Id.* at 123:1-124:11. Her First Amended Complaint lists 132 instances of alleged infringement but does not specify how Wiley supposedly infringed her works.¹ Instead, it lists seven ways which, “upon information and belief,” it was theoretically possible for someone to commit infringement, such as “[p]ublishing Plaintiff’s works without permission,” or “[e]xceeding the limitations of licenses by printing more copies of the publications than was authorized,” among other possibilities. Doc. 29 (“First Am. Compl.”) ¶ 28. Indeed, she has pursued these claims even though many of the licenses she issued to Wiley contain *no limitation* on the

¹ Dwight lists 132 photographs in the exhibit to her First Amended Complaint. While multiple rows of the exhibit involve the same photographs and/or publications, and therefore do not allege discrete acts of infringement, for ease of reference Wiley will refer to each row herein as a separate claim. *See* Curley Decl., Ex. A.

number of copies Wiley could print. Thus, after months of expensive and often scorched earth discovery conducted by Dwight, the undisputable record demonstrates that there is no basis for 104 of Dwight's claims.

For 29 of the claims made by Dwight, Wiley made no use of the subject photo, including two instances where Dwight has not even identified which of her photos allegedly were infringed. For 72 of the infringements claimed by Dwight, Wiley's use was in compliance with the licenses granted to it by Dwight or her agents or Dwight has offered no evidence of those licenses' limitations, if any. Five more uses challenged by Dwight were permissible as revisions to a collective work pursuant to Section 201(c) of the Copyright Act. Dwight lacks copyright registrations for three of the photos she claims were infringed. Finally, at least one of her claims is barred by the statute of limitations.²

STATEMENT OF FACTS³

Wiley is a publisher of educational and other books. Wiley 56.1 ¶ 1. Dwight formerly was engaged as a professional photographer who offered her stock photos for licensing, either directly or through photo agencies such as Corbis and PhotoEdit. Wiley 56.1 ¶ 2. Dwight, both directly and through her authorized agents, has licensed Wiley to include some of her stock photos in various Wiley publications, and Dwight received payments from Wiley in exchange. Wiley 56.1 ¶¶ 3-4.

For example, on September 26, 1991, Wiley entered into a licensing agreement with Dwight which permitted Wiley to include six of Dwight's photos ("tonic neck reflex," "mother and baby after bath," "cute, chubby, smiling baby," "mother & baby eye contact," "cooperative play- lego construction," and "boy & girl dancing") in the book *Child Psychology*. Wiley 56.1 ¶ 43; Curley Decl., Ex. BB. This agreement set *no* limit on the number of copies Wiley could print of the book

² Six of the alleged uses each fail on two separate grounds.

³ A fuller statement of the facts relevant to this motion are contained in Wiley's Rule 56.1 Statement of Material Facts.

containing Dwight's images. *Id.* In the years since, Wiley entered into more than a dozen licensing agreements directly with Dwight. Wiley 56.1 ¶¶ 43, 49, 58, 66, 73, 90, 96, 98, 104, 108, 116.

Wiley also entered into a number of licensing agreements with Dwight's authorized agents Corbis and PhotoEdit. For example, on June 19, 2012, Wiley entered into a licensing agreement with PhotoEdit that permitted Wiley to include the photo "six year old Hispanic boy sounding out word reads to his dad helping him with homework at table" in the book *Living Psychology*. Curley Decl., Ex. VV. This license granted Wiley "World English language rights for print/e-book/web/all manner of media/custom/derivative works/including international student version" in an unlimited number of copies. *Id.*

Wiley now moves for summary judgment with respect to most of Dwight's claims.

ARGUMENT

I. DWIGHT HAS COME FORWARD WITH NO EVIDENCE OF INFRINGEMENT FOR NINETY-SIX OF HER CLAIMS

To prevail on her claim for copyright infringement, a plaintiff must prove two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.'" *Sheldon Abend Revocable Trust v. Spielberg*, 748 F. Supp. 2d 200, 203 (S.D.N.Y. 2010) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). To prove the "unauthorized copying" element of an infringement claim, "a plaintiff must show both that [her] work was 'actually copied' and that the copying amounts to an 'improper or unlawful appropriation.'" *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003) (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998)).

Dwight has come forward with no evidence that Wiley actually copied, distributed, or otherwise used many of her photographs without authorization: Wiley did not make twenty-nine of the uses alleged in the First Amended Complaint, and sixty-seven of the remaining challenged uses

were fully authorized under Wiley’s licenses or Dwight has failed to offer evidence of those licenses’ terms. As a result, Dwight’s infringement claim should be largely dismissed.

A. Dwight Cannot Show that Wiley Made Twenty-Nine of the Claimed Uses

In order to prove copyright infringement, one must show that the alleged infringer actually used the work at issue. *Hecke v. Clear Channel Commc’ns, Inc.*, No. 04 Civ. 1583 (JSR), 2005 WL 975837, at *1-2 (S.D.N.Y. Apr. 27, 2005); *accord Green v. Lindsey*, 885 F. Supp. 469, 477 (S.D.N.Y. 1992) (“plaintiff must prove that defendant *actually used plaintiff’s work* as a source of material or ideas for her own work”), *aff’d*, 9 F.3d 1537 (2d Cir. 1993) (emphasis added); 3 William F. Patry, *Patry on Copyright* § 9:16 (because “[t]here is no presumption of copying,” “[a] plaintiff must . . . prove that defendant copied from its work”). If a copyright plaintiff cannot provide evidence to raise an issue of fact as to actual use, summary judgment for the defendant is warranted. *See, e.g., Hecke*, 2005 WL 975837, at *1-2 (granting summary judgment where plaintiff presented no evidence of copying, finding that “no reasonable fact-finder could conclude that defendant . . . committed infringement” (citing *Jorgensen*, 351 F.3d at 51)).

Here, Wiley’s uncontroverted evidence shows that Wiley never made 29 of the alleged uses of Dwight’s photographs in the First Amended Complaint:

- Wiley did not publish the textbooks in which Dwight claims ten of her photographs were allegedly used (Rows 73, 74, 94, 95, 96, 97, 103, 106, 107, 130).
 - *Child Psychology First Canadian Edition* (two photographs). Wiley 56.1 ¶¶ 80-81.
 - *Child Psychology Second Canadian Edition*. Wiley 56.1 ¶¶ 84-85.
 - *Child Psychology: A Canadian Perspective Third Edition*. Wiley 56.1 ¶¶ 87-88.

- *Psychology Around Us Canadian Edition*. Wiley 56.1 ¶¶ 186-87.
- *Psychology Around Us Canadian Edition eBook*. Wiley 56.1 ¶¶ 189-90.
- *Psychology Around Us Canadian Binder Ready Version*. Wiley 56.1 ¶¶ 192-93.
- *Psychology Around Us Second Canadian Edition*. Wiley 56.1 ¶¶ 195-96.
- *Cyber Psych Multimedia CD-Rom Version Two*. Wiley 56.1 ¶¶ 223-24.
- *Psychology: Australian and New Zealand Edition*. Wiley 56.1 ¶¶ 226-27.

- Dwight's First Amended Complaint asserts thirteen instances where Wiley allegedly infringed one of her photos in an unspecified manner (Rows 104, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 132), but she has made no showing that Wiley used these photographs.

- "3 year old girl pointing to motivational sticker chart"
- "Babysitter putting baby to bed"
- "Toddler points at book"
- "Piaget conservation"
- "Mother nurses young baby"
- "Girl does homework with mother looking on"
- "Girl makes salad with mother"
- "Girl comforts crying infant sister"
- "3 year old girl with single mother"
- "Baby girl examines ball"
- "Baby on back holding toy"
- "Newborn baby crying held by mother"

- “11 month old baby sits on the floor and bangs on metal bowls with wooden spoon”

Wiley 56.1 ¶¶ 269-70.

- Dwight asserts four additional instances where Wiley allegedly used one of her photos in a particular book. Although Wiley did obtain licenses for these photos, Dwight has come forward with no evidence that the photos ultimately were included in those books (Rows 99, 100, 101, 102).

- *Nutrition: Science and Applications Second Edition*
- *Nutrition: Science and Applications Second Edition with Booklet Package*
- *Nutrition: Science and Applications Second Edition BRV with Booklet Package*
- *Nutrition: Science and Applications Second Edition eBook*

Wiley 56.1 ¶¶ 199, 205, 211, 217.

- Dwight asserts two additional instances where she claims Wiley made use of her photo in a particular book, but she has not identified which photo of hers Wiley supposedly used: Rows 83, 85. Wiley 56.1 ¶¶ 161, 164.

These claims accordingly fail.

Dwight’s own testimony, far from raising an issue of fact, supports the conclusion that Wiley never made any of these uses. Dwight admitted at her deposition that “I can’t personally prove that these copyright violations have occurred,” Curley Decl., Ex. B at 44:16-20, “I don’t have specific information about how [my] photos were used,” *id.* at 46:17-24, and “I have no factual proof that they have exceeded the license[s].” *Id.* at 47:17-20. Rather, she merely “think[s] it is possible” that infringement has occurred. *Id.* at 56:5-8.

In view of Wiley's evidence and Dwight's own testimony, "no reasonable fact-finder could conclude that defendant . . . committed infringement" as to the uses identified above. *Hecke*, 2005 WL 975837, at *2. Accordingly, to the extent Dwight's copyright claim is based on these twenty-nine uses (Rows 73-74, 83, 85, 94-97, 99-104, 106-07, 114-24, 130, 132), it must be dismissed.

B. Dwight Cannot Show that Wiley Violated Her Licenses for Seventy-Two of the Claimed Uses

A claim of copyright infringement fails where the alleged infringer was granted a non-exclusive license to use the work and the use remains within the scope of that license. *See Spinelli v. NFL*, No. 13 Civ. 7398(RWS), 2015 WL 1433370, at *36 (S.D.N.Y. Mar. 27, 2015) ("use of a copyrighted work within the scope of a valid license is non-infringing as a matter of law"); *Harris v. Simon & Schuster, Inc.*, 646 F. Supp. 2d 622, 630 (S.D.N.Y. 2009) ("A valid license, either exclusive or non-exclusive, 'immunizes the licensee from a charge of copyright infringement, provided that the licensee uses the copyright as agreed with the licensor.'" (citation omitted)); *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) ("A copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement."). Where the parties dispute not the existence, but only the scope of a license, "the copyright owner bears the burden of proving that the defendant's copying was unauthorized." *Tasini v. N.Y. Times Co.*, 206 F.3d 161, 171 (2d Cir. 2000) (citation omitted). If a plaintiff cannot meet this burden, an infringement claim cannot stand. *See, e.g., Reinhardt v. Wal-Mart Stores, Inc.*, 547 F. Supp. 2d 346, 355 (S.D.N.Y. 2008) (dismissing infringement claim where disputed use was within scope of license).

1. Use Where Wiley Remained Within the Scope of its License

Wiley is entitled to judgment as a matter of law with respect to sixty-six claims listed in Dwight's First Amended Complaint where the undisputed evidence demonstrates that Wiley had a valid license and its use was in compliance with that license.

(a) Unlimited Licenses

For twenty-seven of the instances of infringement claimed by Dwight, any possibility of infringement is foreclosed by the terms of Wiley's licenses, pursuant to which Dwight or her authorized agent granted unlimited rights to Wiley. Indeed, at her deposition, Dwight conceded that no matter how many copies Wiley may have produced, Wiley did not exceed the terms of these licenses. Curley Decl., Ex. B at 82:21-25 ("Q. So irrespective of how many copies they ultimately printed and distributed, they wouldn't have violated this license; is that correct? A. Not in terms of how I wrote it."); *id.* at 83:5-8 ("Q. So if they printed any number of copies, they wouldn't have violated this invoice? A. Not according to the terms that I put on the invoice."). Thus, the following instances of infringement alleged by Dwight all fail:

Textbook	Photograph	Exhibit 1 Row	Applicable License(s)
<i>Child Psychology: The Modern Science First Edition</i>	tonic neck reflex	1	Dwight license number 14191, dated Sept. 26, 1991 Wiley 56.1 ¶¶ 43-47.
	mother & baby after bath	2	
	cute, chubby, smiling baby	3	
	mother & baby eye contact	4	
	cooperative play – lego construction	5	
	boy & girl dancing	6	
<i>Child Psychology Second Edition</i>	Baby tonic neck reflex	7	Dwight license number 94157, dated August 25, 1994 Wiley 56.1 ¶¶ 49-53.
	Mother & baby	8	
	Children in preschool playing	10	
<i>Child Psychology</i>	Baby showing tonic neck reflex	11	Dwight license number 98132, dated July 21, 1998

<i>Third Edition</i>	Girl 7 mos. old naked happy	12	Wiley 56.1 ¶¶ 58-62.
	mother and baby in face to face interaction	13	
	kids in daycare engaged in cooperative play	14	
<i>Abnormal Psychology First Edition</i>	Senior Day Program	22	Dwight license number 22369, dated July 12, 2004 Wiley 56.1 ¶¶ 90-94.
	Portrait of boy with Down syndrome	23	
	Girl taking Rorschach inkblot test	24	
	Girl taking WISC-III picture completion test	25	
<i>Living Psychology First Edition</i>	Boy sounding out word reading with father's assistance	79	PhotoEdit license number 226438, dated June 19, 2012 Wiley 56.1 ¶¶ 153-54.
<i>Living Psychology First Edition eBook</i>	Boy sounding out word reading with father's assistance	80	PhotoEdit license number 226438, dated June 19, 2012 Wiley 56.1 ¶¶ 156-57.
<i>Visualizing Nutrition: Everyday Choices Second Edition</i>	6-month-old Hispanic baby girl sits in high chair while eating	81	PhotoEdit license number 225148, dated August 9, 2011 Wiley 56.1 ¶¶ 168-69.
<i>Visualizing Nutrition: Everyday Choices Second Edition eBook</i>	6-month-old Hispanic baby girl sits in high chair while eating	82	PhotoEdit license number 225148, dated August 9, 2011 Wiley 56.1 ¶¶ 171-72.
<i>Psychology Around Us Second Edition</i>	Baby finding hidden toy (twice)	92, 93	PhotoEdit license number 225838, dated January 19, 2013 Wiley 56.1 ¶¶ 183-84.
<i>Psychology Around Us Second Canadian Edition</i> ⁴	Baby finding hidden toy	97	PhotoEdit license number 225838, dated January 19, 2013 Wiley 56.1 ¶ 197.
<i>Visualizing</i>	closeup of 6 month old	111	PhotoEdit license number 223767,

⁴ As discussed above, this textbook was not published by Wiley. However, even if Dwight believed that this book was published, she had no basis to include this claim given the unlimited license she issued.

<i>Human Biology Third Edition</i>	baby holding box of rice cereal		dated August 31, 2010 Wiley 56.1 ¶¶ 242-43.
<i>Visualizing Human Biology Third Edition Binder Ready Version</i>	closeup of 6 month old baby holding box of rice cereal	112	PhotoEdit license number 223767, dated August 31, 2010 Wiley 56.1 ¶¶ 245-46.
<i>Visualizing Human Biology Third Edition eBook</i>	closeup of 6 month old baby holding box of rice cereal	113	PhotoEdit license number 223767, dated August 31, 2010 Wiley 56.1 ¶¶ 252-53.

(b) License Limit Not Exceeded

For another thirty-nine claimed infringements, the undisputed evidence shows that Wiley had a valid license for each of these challenged uses and in each case remained in compliance with the license:

Textbook	Photograph	Exhibit 1 Row	Applicable License(s)	Licensed Print Run	Actual Print Run
<i>Child Psychology Fourth Edition</i>	Girl 7 mos. old naked happy	19	Dwight license number 22311, dated Sept. 15, 2003	25,000 copies Wiley 56.1 ¶ 67.	Less than 25,000 copies Wiley 56.1 ¶ 68.
	mother and baby in face to face interaction	20			
	kids in daycare engaged in cooperative play	21	Wiley 56.1 ¶ 66.		
<i>Abnormal Psychology Second Edition</i>	WISC-III reimbursement of permissioning fee from Harcourt Assessment	40	Dwight license number 22571, dated August 21, 2007 Wiley 56.1 ¶ 98.	100,000 copies Wiley 56.1 ¶ 99.	Less than 100,000 copies Wiley 56.1 ¶ 100.
<i>Foundations and Change in Early Childhood Education First Edition</i>	4 month old baby girl holding toy	26	Dwight licenses number 22534 and 22534_II, dated January 21, 2007	40,000 copies Wiley 56.1 ¶ 109.	Less than 40,000 copies Wiley 56.1 ¶ 110.
	preschool 3-4 year olds boys pretending to feed dolls	27			
	multicultural	28	Wiley 56.1 ¶		

	classroom 5 year olds		108.		
	Adult observing children playing	29			
	3-5 year olds playing in cardboard boxes dramatic play area	30			
	small group of multicultural children with teacher circle time	31			
	Parent and child reading book together	32			
	Public school Grade 3	33			
	Separation preschool parent talking with child	34			
	Boy with Fragile-X and teacher	35			
	Preschool gifted and talented boy with teacher writing and talking about the Greek alphabet	36			
	children caring for fish in aquarium	37			
<i>Educational Psychology First Edition</i>	Teacher in Parent Teacher conf	47	Dwight license number 22706, dated October 5, 2009 Wiley 56.1 ¶ 116.	100,000 copies Wiley 56.1 ¶ 117.	Less than 100,000 copies Wiley 56.1 ¶ 118.
	Teachers meeting & planning	48			
	Teacher mentoring student	49			
	Two students count on fingers	50			
	French teacher with 2 students	51			
	10 year old at	52			

	home discussing homework with father				
	Grade 6 science class	53			
	Teenagers posing in group	54			
	High School knitting elective	55			
	Teacher introduces new concept to group of children	56			
	2 girls close friendship	57			
	Teacher praising student	58			
	Student working with auto shop mentor	59			
	Teacher meeting with student	60			
	Students using computers	61			
	Students working on computers geography lesson	62			
<i>Clinical Psychology First Edition</i>	Black male psychologist gives girl the VMI (Beery) Test	75	PhotoEdit license number 221942, dated July 17, 2009 Wiley 56.1 ¶ 126.	40,000 copies Wiley 56.1 ¶ 127.	Less than 40,000 copies Wiley 56.1 ¶ 128.
<i>Clinical Psychology First Edition eBook</i>	Black male psychologist gives girl the VMI (Beery) Test	76	PhotoEdit license number 221942, dated July 17, 2009 Wiley 56.1 ¶ 133.	40,000 copies Wiley 56.1 ¶¶ 127, 134.	Less than 40,000 copies Wiley 56.1 ¶ 135.
<i>Psychology Around Us First Edition</i>	Baby finding hidden toy	86	PhotoEdit license number 222463, dated October 30, 2009	100,000 copies Wiley 56.1 ¶ 175.	Less than 100,000 copies Wiley 56.1 ¶

			Wiley 56.1 ¶ 174.		178.
	2 month old baby looks at mobile	87	Corbis license number 1000066564, dated January 15, 2010	100,000 copies	
	Mother talking with 16 month old baby	105	Wiley 56.1 ¶ 176.	Wiley 56.1 ¶ 177.	
<i>Social Psychology First Edition</i>	Toddler girl feeds doll bottle	110	PhotoEdit license number 222220, dated September 16, 2009 Wiley 56.1 ¶ 235.	100,000 copies Wiley 56.1 ¶ 236.	Less than 100,000 copies Wiley 56.1 ¶ 237.
<i>Choosing Childcare for Dummies First Edition</i>	Preschool boy and girl dressup pretend play Cover photo	127	PictureQuest license number P010980800, dated April 1, 2003 Wiley 56.1 ¶ 261.	100,000 copies Wiley 56.1 ¶ 262.	Less than 100,000 copies Wiley 56.1 ¶ 263.

Dwight has come forward with no evidence showing that any of the uses made by Wiley identified above were made without authorization or beyond the scope of that authorization, and her testimony raises no issues of fact. *See, e.g.,* Curley Decl., Ex. B at 47:8-11 (“Q. So you don’t know whether they exceeded their license limitations in those instances; is that correct? A. I don’t know.”). These claims accordingly fail and should be dismissed (Rows 1-8, 10-14, 19-37, 40, 47-62, 75-76, 79-82, 86-87, 92-93, 97, 105, 110-13, 127). *Graham*, 144 F.3d at 236.

2. Uses Where Dwight Has Come Forward With No Evidence of Limitations Applicable to Wiley's License or that Wiley Exceeded Any Such Limitation

In addition to the claims addressed above, Dwight asserts six other instances where Wiley allegedly exceeded the terms of the license granted to it. (Rows 78, 98, 99, 100, 101 and 102). It is undisputed that Dwight's authorized agent, PhotoEdit, issued licenses to Wiley which permitted Wiley to include the subject image in each of the challenged books, and Dwight was paid by her agent in connection with these licenses. First Am. Compl., Ex. 1; Patelli Decl. ¶¶ 3-4; Curley Decl., Exs. SS, UU, BBB. Dwight has come forward with no evidence demonstrating what limitations, if any, were placed on Wiley's authorized uses identified below:

Textbook	Photograph	Exhibit 1 Row	Evidence of License
<i>Personality: Theory and Research Ninth Edition</i>	Man taking WAIS-R	98	First Am. Compl., Ex. 1; Curley Decl., Ex. SS
<i>Personality: Theory and Research Eleventh Edition</i>	Man taking WAIS-R	78	First Am. Compl., Ex. 1; Curley Decl., Ex. UU.
<i>Nutrition: Science and Applications Second Edition</i> ⁵	6-month-old Hispanic baby girl sits in high chair while eating iron fortified rice cereal being spoon fed to her by her older sister at home	99	First Am. Compl., Ex. 1; Curley Decl., Ex. BBB.
<i>Nutrition: Science and Applications Second Edition with Booklet Package</i>	6-month-old Hispanic baby girl sits in high chair while eating iron fortified rice cereal being spoon fed to her by her older sister at home	100	First Am. Compl., Ex. 1; Curley Decl., Ex. BBB.
<i>Nutrition: Science and Applications Second Edition BRV with Booklet Package</i>	6-month-old Hispanic baby girl sits in high chair while eating iron fortified rice cereal being spoon fed to her by her older sister at home	101	First Am. Compl., Ex. 1; Curley Decl., Ex. BBB..
<i>Nutrition: Science</i>	6-month-old Hispanic baby girl sits	102	First Am. Compl., Ex. 1;

⁵ For each of the four uses in the *Nutrition: Science and Applications Second Edition* family, as discussed above, Dwight has also failed to show that the photograph in question was even

<i>and Applications Second Edition eBook</i>	in high chair while eating iron fortified rice cereal being spoon fed to her by her older sister at home		Curley Decl., Ex. BBB.
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Because Dwight has not shown that any limitations were applicable to Wiley's use, these claims fail. *See Tasini*, 206 F.3d at 171 (where parties dispute scope of license, “the copyright owner bears the burden of proving that the defendant’s copying was unauthorized” (citation omitted)); *see also Wu v. Pearson Educ., Inc.*, No. 10 Civ. 6537 (KBF), 2013 WL 145666, at *5 n.9 (S.D.N.Y. Jan. 11, 2013) (noting it is plaintiff’s “responsibility, over the course of . . . litigation, to assemble some proof for his case”).

II. DWIGHT LACKS A COPYRIGHT REGISTRATION FOR THREE OF HER CLAIMS

“The absence of a valid copyright registration . . . bar[s] a plaintiff from bringing a viable copyright infringement action.” *L.A. Printex Indus., Inc. v. Le Chateau, Inc.*, No. 11 Civ. 4248 (LTS), 2012 WL 987590, *3 & n.4 (S.D.N.Y. Mar. 23, 2012); *see, e.g., Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 125 (2d Cir. 2014). Here, the evidence shows that Dwight lacks a copyright registration for three of her photographs.

Due to Dwight’s initial failure to identify copyright registrations underlying her claims, Magistrate Judge Peck ordered her to produce a list of his photos in suit, with “all of the photographs linked to the copyright registrations” that cover each specific photo, and “an affidavit . . . as to the accuracy of that representation.” Curley Decl., Ex. NNN at 6:12-14. Dwight submitted a declaration dated January 6, 2015, and then provided an amended declaration a week later, on January 13, 2015. *See id.*, Ex. G. Neither of her declarations, however, identify any registration covering the following images for which she has asserted claims:

- “3rd Grade Children in NY Elementary School” in *Foundations and Change in Early Childhood Education First Edition* (Row 89). Wiley 56.1 ¶ 114.
- “Paren [sic] kneeling with toddler” in *Foundations and Change in Early Childhood Education First Edition* (Row 90). Wiley 56.1 ¶ 114.
- “Boy with 3 glasses” in *Development of Children and Adolescents First Edition* (Row 72). Wiley 56.1 ¶ 124.

Because Dwight has come forward with no evidence that these three photos are covered by a valid and subsisting copyright registration, her claims relating to these photographs (Rows 72, 89, 90) fail.

III. REUSE OF FIVE OF DWIGHT’S PHOTOS WAS PERMISSIBLE UNDER 17 U.S.C. § 201(c)

Five of Dwight’s claims challenge Wiley’s use of Dwight’s photos in later editions of the books for which Wiley originally was licensed to include those photos. These claims are barred as a matter of law because such use is permitted as a revision to a collective work pursuant to Section 201(c) of the Copyright Act. *See* 17 U.S.C. § 201(c).

The respective rights of the creator of a collective work, such as a textbook, and the creators of the individual contributions to that collective work, such as photos, are governed by section 201(c). Section 201(c) specifies that, while copyright in an individual contribution like a photo “vests initially in the author of the contribution,” the holder of the copyright in the collective work (*i.e.*, the textbook) obtains “the privilege of reproducing and distributing the contribution as part of that particular collective work, *any revision of that collective work*, and *any later collective work in the same series.*” (Emphasis added). As the Second Circuit observed, under Section 201(c), “a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it.” *Faulkner v.*

Nat'l Geographic Enters. Inc., 409 F.3d 26, 34 (2d Cir. 2005) (quoting H.R. Rep. No. 94-1476, at 122-123 (1976)).

Dwight claims (in row 9) that Wiley made unauthorized use of her photo “cute, chubby, smiling baby” by including it in the second edition of the book *Child Psychology*. It is undisputed, however, that Wiley was licensed to include that photo in the prior collective work in that same series—the first edition of *Child Psychology*. Curley Decl., Ex. BB. Because none of the terms of that license “expressly overrid[e] Section 201(c),” Wiley’s inclusion of “cute, chubby, smiling baby” in the second edition is a permitted non-infringing revision under Section 201(c). *Faulkner*, 409 F.3d at 40. The same is true for the following uses challenged by Dwight:

Challenged Revision	Photograph	Exhibit 1 Row	Licensed Prior Edition in Same Series
<i>Child Psychology</i> , 3e, Int’l Edition	Baby showing tonic neck reflex	15	<i>Child Psychology</i> , 3e, Wiley 56.1 ¶¶ 58, 59, 64; Curley Decl., Ex. GG
<i>Child Psychology</i> , 3e, Int’l Edition	Girl 7 mos. old naked happy	16	<i>Child Psychology</i> , 3e, Wiley 56.1 ¶¶ 58, 59, 64; Curley Decl., Ex. GG
<i>Child Psychology</i> , 3e, Int’l Edition	mother and baby in face to face interaction	17	<i>Child Psychology</i> , 3e, Wiley 56.1 ¶¶ 58, 59, 64; Curley Decl., Ex. GG
<i>Child Psychology</i> , 3e, Int’l Edition	kids in daycare engaged in cooperative play	18	<i>Child Psychology</i> , 3e, Wiley 56.1 ¶¶ 58, 59, 64; Curley Decl., Ex. GG

Thus, the Court should grant Wiley summary judgment with respect to these claims (Rows 9, 15-18).

IV. ONE OF DWIGHT’S CLAIMS IS INDISPUTABLY BARRED BY THE STATUTE OF LIMITATIONS

The statute of limitations for copyright infringement claims is three years. 17 U.S.C.

§ 507(b). The Second Circuit has held that copyright claims accrue upon actual or constructive discovery of the alleged infringement. *Psihoyos*, 748 F.3d at 125. Thus the claim accrues “when the copyright holder discovers, or with due diligence should have discovered, the infringement.” *Cooley v. Penguin Group (USA) Inc.*, 31 F. Supp. 3d 599, 611 (S.D.N.Y. 2014). As the Second Circuit has noted in describing the diligence-discovery rule more broadly, once a plaintiff has a “hunch, hint, suspicion, or rumor of a claim,” such suspicions “give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence.” *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998).

Here, Dwight alleges that Wiley used her photograph “cute, chubby, smiling baby” without a license in its textbook *Child Psychology Second Edition* (Row 9). First Am. Compl., Ex. 1. Dwight was indisputably on notice of Wiley’s potentially infringing use of this photograph no later than July 21, 1998. On that date, Dwight wrote a letter to Hillary Newman, a senior photo editor at John Wiley & Sons in connection with the licensing process for the same photographs in the third edition of the same book. She stated that “life was too short to try and figure out” if “cute, chubby, smiling baby” was used in the second edition of *Child Psychology*, and so was giving Wiley the discounted reuse rate. Wiley 56.1 ¶ 54, Curley Decl., Ex. FF. Thus, Dwight had at least a hint at a possible infringement claim, requiring her to exercise due diligence to inquire into its possible existence. Dwight was required to bring suit on this claim no later than July 21, 2001, more than a decade before this suit was brought. Thus this claim (Row 9) is time barred and should be dismissed.⁶

⁶ All of Dwight’s claims ultimately should be barred by the statute of limitations. Because application of the statute of limitations to other of Dwight’s claims may present factual issues, and those claims fail for other reasons, Wiley has not moved on statute of limitations grounds for those claims (but reserves its

V. DWIGHT MAY NOT RECOVER STATUTORY DAMAGES OR ATTORNEY’S FEES ON CERTAIN CLAIMS

To the extent Dwight’s claims survive dismissal, Dwight should not be entitled to statutory damages or attorney’s fees for 13 of her claims because she did not register the copyrights at issue until after the alleged infringements occurred.⁷

The Copyright Act expressly states that: “no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for . . . any infringement of copyright in an unpublished work commenced *before the effective date of its registration*.” 17 U.S.C. § 412 (emphasis added); *see, e.g., Secunda v. Time Warner Cable of NYC*, No. 95 Civ. 0671 (SAS), 1995 WL 675464, at *2 (S.D.N.Y. Nov. 14, 1995) (“No award of statutory damages or attorney’s fees may be made for an infringement of copyright occurring prior to the effective date of copyright registration.”); *Cognotec Servs., Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 862 F. Supp. 45, 52 (S.D.N.Y. 1994) (“Any awards of statutory damages or of attorney’s fees are precluded when the infringement occurs prior to the effective date of registration.”). Moreover, “a plaintiff may not recover statutory damages and attorney’s fees for infringement occurring after registration if that infringement is part of an ongoing series of infringing acts and the first act occurred before registration.” *Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150, 158 (2d Cir. 2007).

The following claimed copyright registrations were all made after the commencement of the allegedly infringing conduct:

right to do so, if necessary, at trial).

⁷ To the extent other of Dwight’s claims survive summary judgment, Wiley will demonstrate at trial that Dwight is also not entitled to statutory damages and attorney’s fees with respect to those claims.

Photograph	Exhibit 1 Row(s)	Date of Copyright Registration	Earlier Allegedly Infringing Use
Mother & baby eye contact/Mother & baby/Mother and baby in face to face interaction	91	August 18, 2012 Wiley 56.1 ¶ 16	Prior to May 1, 2003 Wiley 56.1 ¶ 271
Cooperative play- lego construction/Children in preschool playing/ Kids in daycare engaged in cooperative play	45, 46	August 18, 2012 Wiley 56.1 ¶ 16	Prior to May 1, 2003 Wiley 56.1 ¶ 271
Portrait of boy with Down syndrome/Child with Down syndrome	41	May 6, 2014 Wiley 56.1 ¶ 18	Prior to May 1, 2005 Wiley 56.1 ¶ 272
6-month-old Hispanic baby girl sits in high chair while eating iron fortified rice cereal being spoon fed to her by her older sister at home	84	August 17, 2010 Wiley 56.1 ¶ 35	October 27, 2009 Wiley 56.1 ¶ 273
Man taking WAIS-R test	77	August 16, 2012 Wiley 56.1 ¶ 16	March 4, 2004 Wiley 56.1 ¶ 274

Indeed, in many cases, Dwight registered the photograph in question years after it was first used by Wiley, including in some cases as late as 2014. As a result, under 17 U.S.C. § 412, Dwight's registration of these photographs is too late to support an election of statutory damages.

CONCLUSION

For the foregoing reasons, Wiley respectfully requests that the Court grant its motion for partial summary judgment.

Dated: April 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2015, I caused a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT** to be filed with the Court through the ECF system, which generates an electronic notice of service by email to the following counsel of record:

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